IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RETAIL CLERKS UNION, LOCALS 770, 137, 905 and 1222,

Appellants

and

RALPH E. KENNEDY, Regional Director of the Twenty-First Region of the National Labor Relations Board, etc.,

Appellant

vs.

FOOD EMPLOYERS COUNCIL, INC.,

Appellee

On Appeal From The United States District Court For The Southern District Of California, Central Division

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF THE CASE

A. Introductory

These are appeals from an injunction entered by the United States District Court for the Southern District of California, Central Division, in a proceeding instituted by petitioner-appellant, Ralph E. Kennedy, Regional Director of the Twenty-First Region of the National Labor Relations Board (herein called the Board), for and on behalf of the Board, pursuant to

ction 10(1) of the National Labor Relations Act, as amended (61 Stat. 149; Stat. 544; 29 U.S.C. 160(1); herein called "the Act").[1/] The injunction, nominated Order Granting Temporary Injunction, was granted on June 24, 1965, tered on June 25, 1965, and amended by an order nunc pro tunc on June 25, 1965. sum, the injunction enjoined various unions, respondents in the court below d, like the Board, appellants here and various named employers and an employer sociation, designated as appellees here, from maintaining contract provisions olative of Section 8(e) of the Act and from requiring, or submitting to, bitration certain questions bearing upon those contract provisions. The junction, granted at the request of the parties who had filed the unfair bor practice charges, was entered over the objections of the Board and the ions (1) that no injunction was warranted at this time because the unions had

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Section 10(1) of the Act provides, in pertinent part, as follows:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A)(B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law . . . Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony . . . .

tipulated that pending scheduled arbitration proceedings, and thereafter ending Board disposition of the unfair labor practice charges they would not aintain or give effect to the alleged unlawful provisions, and (2) the njunction was too broad in scope. Notices of Appeal therefrom were filed on une 25, 1965 by the Board (R. 221) and the Unions (R. 222-225). urisdiction of this Court is invoked under Sections 1291 and 1292 of Title 28 f the United States Code.

B. The Proceedings Below

On May 7, 1964, American Research Merchandising Institute, United tates Servateria Corp., and Wesco Merchandise Company (herein called "the nstitute", "Servateria" and "Wesco", respectively), filed with the Board's wenty-First Region a joint charge (R. 20-32),[2/] alleging that appellants etail Clerks Unions, Locals Nos. 137, 324, 770, 899, 905, 1167, 1222, 1428 nd 1442 (herein called the "Unions"), had engaged in, and were engaging in, nfair labor practices proscribed by Section 8(e) of the Act.[3/] On the same ay, the Joint Council of Teamsters No. 42 (herein called the "Teamsters") lso filed with the Board's Twenty-First Region a charge (R. 33-39) alleging, nter alia, that Food Employers Council, Inc. (herein called the "Employers

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[2/] The numbers following the abbreviation "R" refer to pages of the transcript of record on appeal. The numbers following the abbreviation "Tr" refer to pages of the reporter's transcript of proceedings held in the court below on June 14, 1965.

[3/] Section 8(e) of the Act provides in pertinent part, as follows:

Sec. 8.(e). It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void . . .

ouncil") and its named members (herein with the Employers Council collectively eferred to as the "Employers"), as well as the Unions, had engaged in, and ere engaging in, similar unfair labor practices proscribed by Section 8(e) of he Act.

Thereafter, on January 8, 1965, the Regional Director, acting on ehalf of the Board, filed in the court below the petition for an injunction, ursuant to Section 10(1) of the Act, seeking to restrain the Unions and the mployers from continuing to engage in the conduct complained of pending final djudication of the charges by the Board (R. 2-58). The petition alleged, in ubstance, that the Director had reasonable cause to believe that on or about pril 1, 1964, the Unions and Employers had entered into a collective bar- aining agreement, effective from that date until March 31, 1969, containing ertain provisions in Article I thereof which were violative of Section 8(e) f the Act (R. 5-11, 13, 15-16), and that these provisions had been continued n effect and were being maintained (R. 15-16). The petition showed that the oard had filed an earlier petition under Section 10(1) to restrain the Unions nd Employers from maintaining, giving effect to, or enforcing Article I of he contract "to the extent found unlawful" but, upon a court approved stip- lation by the Unions and Employers not to engage in such conduct pending oard disposition of the unfair labor practice charges, that proceeding had irst been continued without date on the district court's docket and then, n December 3, 1964, dismissed without prejudice (R. 15-16). The petition hen alleged that in November, 1964, one of the Unions had filed a grievance nder the contract which contained Article I demanding implementation and rbitration of portions of that Article alleged in the Board's petition to be

iolative of Section 8(e), and had instituted proceedings in the California uperior Court to compel arbitration (R. 15).[4/] The petition further alleged hat Local 770 was continuing actively to prosecute the state court action, hat thereby and by the conduct previously alleged Local 770 was continuing to ive effect to the unlawful provisions of Article I (R. 15-16), and that it ould be anticipated that unless enjoined the Unions and Employers would ontinue to give effect to those provisions or enter into similar agreements R. 16). The petition prayed that the Unions and Employers be enjoined, pending oard determination on the merits of the charges, from, inter alia, "maintaining, iving effect to, demanding arbitration of, submitting to arbitration, or enforcin he challenged contract provisions insofar as they were violative of Section 8(e) f the Act, or agreeing to similar provisions (R. 17-18).

Upon the petition, the court below, on January 11, 1965, entered an rder directing, inter alia, that the Unions and Employer file answers to the etition and appear thereafter to show cause why the requested injunctive elief should not be granted (R. 59-61).

Thereafter, the various parties respondent in the court below filed nswers to the petition. In the answer filed by Local 770 and several of the ther Unions, it was alleged inter alia, that on April 6, 1965, they had caused he State court proceeding to compel arbitration to be dismissed; that they seek only an interpretation, whether by arbitration, court proceeding or oluntary negotiations, of the meaning of the contract and what are respondents emaining rights resulting from the unenforceability of the provisions alleged o be unlawful by the Board"; and that "Whatever such interpretation or

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/ As can be seen, the grievance was filed and the state court proceedings were instituted after the stipulation not to maintain or enforce the illegal provisions had been executed in the Board's prior district court proceedings but before dismissal of those proceedings.

decision might be, respondents have no intention to . . . use said interpretation or decision to give any unlawful effect to the contract . . ." (R. 120). The answer prayed that "if the Court does grant injunctive relief, it should be limited to giving effect to /the/ unlawful provisions . . . and should not prohibit the respondents from seeking, whether by arbitration or otherwise, an interpretation of the contract which will not give effect to any of the provisions alleged to be unlawful by the National Labor Relations Board"(R. 121).

As the record indicates, prior to the hearing on the petition,[5] it developed that there were differences between the Unions and the Employers as to what their collective bargaining agreement provided, their understanding as to what they had agreed to or intended to agree to in the course of their bargaining and that both parties had submitted these and other questions to an arbitrator (R. 187, Tr. 30, 34, 41-42, 43-46).[6]

5/ The hearing, originally scheduled by the order to show cause for February 15, 1965, was thereafter continued and not held until May 10, 1965.

6/ The Unions and Employers had agreed to arbitrate the following seven points (R. 188-189):

(1) Paragraph seventeen of said Memorandum Agreement, executed by Mr. Robert K. Fox on behalf of the Food Employers' Council, Inc., and the signatory Unions, wherein it is stated that the agreement would become effective upon ratification by all parties. Conceding that ratification took place prior to April 1, 1964, the effective date of the agreement, it is evident by the Union's position as set forth in Appendix C of the Union's printed copy of the agreement, that there is an issue as to whether or not a meeting of the minds was achieved on March 14, 1964, or whether or not the efforts of the parties over fifteen months of negotiations have been nullified.

(2) The issue of whether or not there has been a failure of consideration, nullifying the March 14, 1964 Memorandum Agreement.

(3) As a result of charges filed with the National Labor Relations Board by the Teamsters Union and certain suppliers, Article I has never become operative and cannot become operative during the term, or a substantial part of the term of our contract, because of the length of time it will require to litigate the Board complaint and subsequent appeals. There is an issue, therefore, as to whether or not the employer is being unjustly enriched

(continued)

As a result, and in order to permit the parties to the contract to resolve the issues between them pursuant to their mutual undertaking to arbitrate, but at the same time to reserve to the Board its function of determining the legality under Section 8(e) of any agreement between them, and also at the same time to prevent them from giving effect to any provision unlawful under Section 8(e), the Board, the Unions and the Employers entered into a stipulation to continue the district court proceedings without date, subject to specific undertakings by the Unions and safeguards to prevent a continuing violation of Section 8(e) or the sanctioning of any interpretation by the arbitrator which in the opinion of Board representatives would render any contractual provisions violative of the Act. Specifically, for purposes of the proceedings in the court below, and only for such purposes, on May 10, 1965, the Board, the Unions

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5/ (continued)

because of the inoperativeness of Article I, in that the employer has been able to take advantage of the (a) broader box-boy duties, (b) new classifications with lower rates for non-food items, and (c) lower apprentice rates, which were given to the employer only upon the understanding of both parties that Article I would be effective and would confer benefits upon the Union.

(4) The issue of which agreement (that printed by Robert K. Fox, or that printed by the Union) shall be applicable.

(5) Has the employer, in good faith, complied with the provision in the March 14, 1964 agreement that it will jointly defend with the Union the legality of Article I?

(6) The issue of whether or not in effect the present Board action and its subsequent inevitable appeals and court actions require an interpretation that "a court of last resort" status has been achieved.

(7) Should the arbitrator find that the status of the "court of last resort" has been attained, and should the parties fail to resolve their differences which have arisen because of the interpretation and application of the March 14, 1964 agreement, then does the Union have the right to take economic action?

and the Employers executed a stipulation to be submitted to the court below, providing in pertinent part as follows (R. 160-167; Tr. 10-12, 24, 46-47):

* * *

1. Pending the final disposition of the matters involved presently pending before the /Board/ . . . respondents, and each of them, WILL REFRAIN FROM:

(a) Maintaining, giving effect to, or enforcing Article I, Sections A. B and F(1) and (2), of that certain Retail Food, Bakery, Candy, and General Merchandise Agreement entered into on or about April 1, 1964, by and between respondent Unions and respondents Food Employers Council and Council Members, and certain other markets, insofar as said Article I requires employees of any distributor, supplier, rack jobber, concessionaire, or any other person doing business with respondent Council Members, or with any other retail food market within the geographical jurisdiction of respondent Unions, or of any of them, to become members of any of respondent Unions' bargaining unit as a condition of being able to perform work in the store or stores or on the premises of any of respondent Council Members, or such other retail food markets; or requires any distributor, supplier, rack jobber or concessionaire to become a party to a concessionaire agreement with any respondent Council Member, or with any other retail food market in whose store or stores employees of such distributor, supplier, rack jobber concessionaire, or such other person, may work; or prohibits the employees of any distributor, supplier, rack jobber, concessionaire, or of any other person, from working in the store or stores of any of respondent Council Members, or in any other retail food market, unless such distributor, supplier, rack jobber, concessionaire, or such other person, becomes a party to the Concessionaire Agreement referred to in Article I of the Clerks' Agreement and agrees to be bound by the terms and conditions of the said Clerks' Agreement; and

(b) Enforcing or confirming, or instituting any proceedings or taking any action in an attempt to enforce or confirm, any arbitration award based upon any provision of Article I of the Clerks' Agreement until or unless such arbitration award has been submitted to the Regional Director of the Twenty-first Region of the Board and he, or some other person authorized to act in his behalf, after consideration of the arbitration award, has concluded that such an award is not repugnant to and does not violate the provisions of Section 8(e) of the Act and the Regional Director, or such other person acting in his behalf, has, in writing, so advised respondents or their counsel of record.

2. In the event that the Regional Director of the Twenty-first Region of the National Labor Relations Board, or any agent of the Board authorized to act in his place or stead, after investigation of an alleged breach by respondents, or any of them, of any of the

provisions of paragraph 1 of this stipulation, has reasonable cause to believe that any of the said provisions have been violated, then, upon the filing of an affidavit by him to that effect, the Court may, without further notice to respondents, enter a temporary injunction against respondents in the form set forth in Exhibit A attached hereto. In such event respondents waive further hearing before the Court, the taking of formal testimony and the making and entering of findings of fact and conclusions of law.

* * *

At the hearing on the petition, held on May 10, 1965, and June 14, 1965, no oral testimony was adduced; the case was considered by the court below on the pleadings and exhibits thereto attached, several additional exhibits filed with the court (R. 31-32, 48-49), and argument of counsel. When the Board submitted the stipulation to the court and asked that the court approve the stipulation and continue the proceedings without the entry of any injunction at that time, the charging parties objected and requested that the court enter an injunction then and there (R. 128, 144, 156). At the hearing on May 10, 1965, and again on June 14, 1965, upon the Board's motion for reconsideration, the court rejected the stipulation and over the Board's objections granted an injunction.

Additionally, at the hearing on June 14, 1965, the court, at the request of the charging parties and over the objection by the Board that any injunction should not "go beyond that conduct which would violate Section 8(e)" and should not "prevent arbitration . . . to the extent that it will not in any way affect the application of the . . . Act", directed that the injunction should enjoin the Unions and Employers from proceeding inter alia with their arbitration (Tr. 50-52, 53-54). The court concluded that notwithstanding the stipulation and position of the Board, the injunction should issue now, as requested by the charging parties, and in the scope as requested by them, because, in sum, the Board's petition filed on January 8, 1965, had sought to enjoin arbitration proceedings (Tr. 6, 7, 50-51). The court was of the

:hat the Board having asserted jurisdiction, it would be inconsistent with :he Board's "exclusive jurisdiction" to permit an arbitrator to determine natters within the Board's jurisdiction (R. 169).

The injunction order filed on June 24, 1965 and entered June 25, as amended by the nunc pro tunc order of June 25, 1965, enjoined the Union and employers, pending Board disposition of the unfair labor practice charges, from (a) "Maintaining, giving effect to, demanding arbitration of, submitting to arbitration, arbitrating, or enforcing Article I, Sections A, B and F(1) and 2)" of the contract between the Unions and Employers "insofar as said Article I" requires conduct violative of Section 8(e) of the Act, (b) from entering into, maintaining, giving effect to, invoking or enforcing any contract or agreement violative of Section 8(e), and (c)"Engaging in or carrying on or carrying on arbitration proceedings now scheduled on or about July 5, 1965, or at any other time submitting to arbitration or arbitrating any issue or dispute arising out of the provisions of Article I of an Agreement dated March 14, 1964, between the Clerks and Employers and others, which are in dispute in proceedings before the National Labor Relations Board, and which pertain to the performance of work within the markets by employees of distributors, suppliers, rack-jobbers, or concessionaires, including, but not limited to the seven points designated to be in dispute in a letter dated March 19, 1965, from the Retail Clerks Union 770 to the President of Food Employers' counsel."

SPECIFICATION OF ERRORS RELIED UPON

. The court below erred in granting an injunction over the Board's objection nd at the request of the charging parties.

. The court below erred in granting an injunction, over the objections of he Board and at the request of the charging parties, which was broader in cope than the Board had sought and not limited to conduct proscribed by ection 8(e) of the Act.

ARGUMENT

I. An injunction under Section 10(1) may be granted only at the request of the Board and the charging party has no standing to secure such injunction.

A. The charging parties have no standing to request the court to grant an injunction.

At the outset, it is well to point out that the merits of the lleged unfair labor practice, i.e. whether the Unions and Employers engaged n conduct violative of Section 8(e) of the Act, are not at issue here. The nions and the Employers having stipulated that they would not engage in onduct violative of Section 8(e) of the Act pending Board disposition of the harges and that an injunction could be entered without further hearing before he court below simply upon the determination of the appropriate Board repre-entative that they were engaging in such conduct, thus leaving to the Board in ccordance with the Act any determination on the merits, thereby dispensed with he need for any determination by the court as to whether there was reasonable ause to believe the Act had been violated.

Section 10(1) of the Act empowers the Board to obtain interim njunctive relief against conduct violative of certain provisions of the Act ending the Board's final disposition of the case on the merits (infra, p.2). t has long been settled that proceedings under the Act are intended to protect he public interest and not the interests of a private party; that the Act ives the Board, a public agency, the power to prevent certain obstructions to ommerce but, although a private party, employee, union or employer may ncidentally benefit thereby, the Act does not provide a forum for the protection f the private interests of a private party. As the Supreme Court has pointed ut, Board proceedings are not intended or designed for the protection of rivate interests but, rather, to vindicate the public interest. Amalgamated

tilities Workers v. Consolidated Edison, 309 U.S. 261, 265, 266; National icorice Co. v. N.L.R.B., 309 U.S. 350, 362, 365. As that Court stated in the malgamated Utilities Workers case, at pages 265-266:

> The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.
>
> * * *
>
> What Congress said at the outset, that the power of the Board to prevent any unfair practice as described in the Act is exclusive, is thus fully carried out at every stage of the proceeding.

Because of the special nature of proceedings under the Act, and the istinction between public and private interests, the courts uniformally deny ntervention in Board proceedings by private parties. See, e.g. N.L.R.B. v. lorida Citrus Fruit Carriers Corp., 288 F. 2d 630, 639-640 (C.A. 5); Aluminum re Co. v. N.L.R.B., 131 F. 2d 485 (C.A. 7). As the Court pointed out in luminum Ore, at page 488:

> The union has asked leave to intervene. This proceeding is in the public interest, prosecuted by an authorized agency of the Government, in furtherance of an express policy and intent upon the part of Congress to establish, in behalf of the national public, a standard of conduct presumably productive of progress in protection of the public welfare. In such proceedings, private parties have no rightful place except as the court may desire to avail itself of helpful suggestions.

In N.L.R.B. v. Retail Clerks International Association, 243 F. 2d 77 (C.A. 9), Safeway Stores, Inc., the charging party in the proceedings before he Board, in the course of an application to discharge the Retail Clerks from udgment of civil contempt of a decree entered by this Court enforcing a Board rder, filed with the Court a "petition requesting this Court to act to rotect its decrees and its pending exercise of jurisdiction thereon by temporary njunctive relief pending its decision herein". The Court, denying this request tated (243 F. 2d at pp. 782-783):

In various proceedings in this case this Court has seen fit to permit Safeway to appear in oral argument and file briefs. When Safeway's petition for injunctive relief came in the picture, Clerks then insisted that Safeway should be restricted to appearing in this controversy in the role of amicus curiae. The Board filed a memorandum opposing the Safeway petition for injunctive relief; arguing that Safeway has no standing to petition this Court for injunctive relief under the National Labor Relations Act, as amended. This issue thus remained for decision at the time this case was finally submitted.

Safeway contends that it is "well established" that a person benefited by an order of the Board has standing "to invoke the aid of the appropriate federal court in proceedings subsequent to judicial enforcement of the Board order, where the Board has failed to take action required to protect the enforcement degree." It places primary reliance on International Union of Mine, Mill and Smelter Workers, Locals Nos. 15, 17, 107, 108, 111 (C.I.O.) v. Eagle-Picher Mining & Smelting Co., 1945, 325 U.S. 335, 65 S. Ct. 1166, 89 L. Ed. 1649.

We are of the view that Eagle-Picher is not authority for the proposition that Safeway has standing to seek the injunctive relief it demands. Eagle-Picher states that unions which had been permitted to intervene as parties in the lower court (also) had standing to petition for certiorari to seek review in the Supreme Court of an adverse decision, from which decision the Board did not take an appeal.

Safeway cites Stewart Die Casting Corporation v. N.L.R.B., 1942, 7 Cir., 129 F. 2d 481, to sustain its argument that it has standing to seek injunctive relief. While that case may provide some support for Safeway's position, a later decision in the same case makes it clear that the Seventh Circuit recognizes that only the Board has standing to prosecute proceedings in aid of its orders. Stewart Die Casting Corporation v. N.L.R.B. 1942, 7 Cir., 132 F. 2d, 801.

We reach the conclusion that Safeway has no standing to petition this Court for injunctive relief against what it alleges is conduct which violates the decrees of this Court. Amalgamated Utility Workers (C.I.O) v. Consolidated Edison Co. of New York, et al., 1940, 309 U.S. 201, 60 S. Ct. 561, 84 L. Ed. 738 (footnotes omitted).

A proceeding under Section 10(1), like proceedings under Section 10(e) f the Act in the courts of appeals to enforce Board orders as in the Safeway nd the other cases cited above, is a proceeding in aid of a Board order; it ancillary to the Board proceeding, designed to afford injunctive relief for the purpose of keeping the entire matter in status quo, and of preventing rustration of effective action by the Board." Building Trades Council, etc. LeBaron, 181 F. 2d 449, 450 (C.A. 9). And the charging parties have no more anding in Section 10(1) proceedings to secure an injunction than they do in court of appeals proceeding to enforce a Board order under Section 10(e) of e Act. Section 10(1) does permit a charging party "to appear by counsel and esent any relevant testimony" but, as the courts have held, this provision fords no basis for a charging party to intervene or otherwise participate as party plaintiff. It is still the Board, and only the Board, which can secure junctive relief, whether temporary under Section 10(1) or permanent under ction 10(e). For "the principal role in these proceedings is to be played the Regional Director acting in the public interest, and while the charging rty is free to aid him in the course of the litigation, the charging party y not substitute itself as the principal complainant." McLeod v. Mechanics nference Board, 300 F. 2d 237, 242-243 (C.A. 2). See also: Meekins, Inc. Boire, 320 F. 2d 445 (C.A. 5); Phillips v. United Mine Workers, District 19, 8 F. Supp. 103 (E.D. Tenn.); Penello v. Burlington Industries, 54 LRRM 2165 .D. Va.); Shore v. Building and Construction Trades Council, 50 LRRM 2139 .D. Pa.).

B. The court below was without authority to grant an injunction at the request of the charging parties and over the Board's objections.

The principle that a district court may not grant injunctive relief n a proceeding under the Act, including a proceeding under Section 10(1) of he Act, unless such relief is requested by the Board, is grounded upon xplicit statutory instruction. The Norris-LaGuardia Act /29 U.S. C.A. § 107/, ith exceptions not here relevant deprives the district courts of juris- iction to issue injunctions in labor disputes. It is settled that when ongress, in enacting Section 10(1), returned to the district courts a measure f jurisdiction to issue injunctions in labor dispute situations such juris- iction was limited to injunctions "obtained only at the instance of the ational Labor Relations Board . . ." and not private litigants. Sinclair efining Co. v. Atkinson, 370 U.S. 195, 204. See also, Meekins v. Boire, 20 F. 2d 445, 448-449 (C.A. 5); McLeod v. Mechanics Conference Board, 300 F. d 237, 242-243 (C.A. 2); Int'l Longshoremen's Union, Local 6 v. Sunset Line & wine Co., 77 F. Supp. 119 (N.D. Cal.); Amazon Cotton Mills Co. v. Textile orkers Union, 176 F. 2d 183, 186-187 (C.A. 4) and cases therein cited. When ection 10(1) was first enacted, in 1947, Congress debated this very point and xpressly rejected a House proposal to permit injunctions "at the request of rivate persons." House Conf. Rept. No. 510, on H.R. 3020, p. 57; 1 Legislative istory of LMRA, 1947, p. 461. "Congress was intent upon taking the Federal ourts out of the labor injunction business except in the very limited cir- umstances left open . . . ." Marine Cooks Union v. Panama S.S. Co., 362 .S. 365, 369. See also Meekins v. Boire, 320 F.2d 445, 448 (C.A. 5); Dunn v. etail Clerks, 307 F. 2d 285, 288 (C.A. 6). And, because the Norris-LaGuardia ct is "such a longstanding, carefully thought out and highly significant part

f this country's labor legislation" /Sinclair Refining Co. v. Atkinson, supra, 70 U.S. at 203/ the Supreme Court has consistently stricken down attempts to estrict, modify or dilute its impact by judicial interpretation. See, e.g., inclair Refining Co., supra; Marine Cooks, supra; United States v. Hutchinson, 12 U.S. 219; Milk Wagon Drivers' Union v. Lake Valley Farm Products, 311 U.S. 1; New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552; Lauf v. Shinner, 03 U.S. 323. And see Allen Bradley Co. v. Local Union No. 3, IBEW, 25 U.S. 797, 805.

Congress has been specific where it intended to permit private itigants an exception to the Norris-LaGuardia ban. Thus, Section 302 of the abor Management Relations Act /61 Stat. 157, 29 U.S.C., § 186/ prohibits ertain employer payments to employee representatives and, in recognition of he unusually sensitive and important nature of the problem, expressly permits rivate litigants to seek an injunction without regard to Norris-LaGuardia. ee § 302 (e), 29 U.S.C., § 186 (e). But this section "stands alone in expressly ermitting suits for injunctions . . . by private litigants . . ." Sinclair efining Co., supra, 370 U.S. at 205, n. 19. No additional exceptions should e implied by the courts, for the Norris-LaGuardia Act "leaves not the slightest pening for reading in any exceptions beyond those clearly written into it by ongress itself." Sinclair Refining Co., supra, 370 U.S. at 202.

It seems too plain to warrant extensive argument that the charging arties cannot evade the prohibition of the Norris-LaGuardia Act, the statutory cheme of our Act, and the clear Congressional mandate by using a proceeding nstituted by the Board as a vehicle to secure relief which the Board was not equesting and which they could not secure in an independent suit.

Finally, we think it is equally plain that the court below did not, nd indeed could not, grant the injunction sua sponte. Although the Court

has the power and obligation to grant such relief as may be "just and proper", that necessarily means that he need not grant an injunction simply because the Board petitions for one, and he need not grant all the relief the Board might seek in a case if he felt such were not "just and proper"; but to construe the "just and proper" criterion so as to permit a court sua sponte to grant an injunction when the Board does not request one or to enjoin more than the Board seeks to enjoin, would in effect substitute the court for the administrative agency designated by Congress to enforce the Act, to determine initally whether there is reasonable cause to believe the Act is being violated, and to determine the appropriate remedy. This Court's observation in N.L.R.B. v. Lewis Food Co., 249 F. 2d 832, 838, affirmed 357 U.S. 10, is appropriate here:

> By virtue of § 3 (d), 29 U.S.C.A. § 153 (d), the General Counsel has "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board." His decision on whether to issue a complaint charging an unfair labor practice is final and is not reviewable by either the Board or the courts. Lincourt v. N.L.R.B., 1 Cir., 170 F. 2d 306; Hourihan v. N.L.R.B., 91 U.S. App. D.C. 316, 201 F. 2d 187; Anthony v. N.L.R.B., 6 Cir., 204 F. 2d 832. If he decides to direct issuance of a complaint, it is his responsibility to prosecute the matter. In this role also he exercises broad powers. International Union, etc. v. N.L.R.B., 9 Cir., 231 F. 2d 237, 242. Here then is an official who has life-or-death authority over the initiation of an unfair labor practice proceeding and who, if he determines that such proceedings should be commenced, is entrusted with the task of prosecution.

In short, we submit that although the court may curb the Board, within statutory limits and sound discretion, by narrowing the injunctive relief requested by the Board, it cannot on its own motion enjoin more than the Board seeks to enjoin. And this is consistent with the normal rule in injunction litigation between private parties. Although a court is not necessarily limited to the pleadings in granting relief but may grant such relief as appears

appropriate from the facts as developed at the trial, "ordinarily relief which neither party desires should not be forced on them." 6 Moore's Federal Practice, 2nd Ed., 1208.

II. The court below erred in entering an injunction over the Board's objection which is too broad in its proscription.

There is, of course, no specific statutory prohibition outlawing the salutory method of resolving labor disputes by arbitration. On the other hand, it would seem that arbitration proceedings should not be utilized as a stratagem to enforce or maintain contractual provisions in a manner which makes the provisions unlawful under the Act. Conceivably, questions may arise under a particular provision which, as ultimately resolved by an arbitrator, will not have the effect which Section 8(e) is intended to prevent, i.e. an agreement by an employer that he would not do business with another employer. Conceivably, too, if the question is whether the parties had a meeting of the minds and actually intended that the employer would not do business with another employer, an arbitrator might find that there had been no meeting of the minds and, perhaps, no agreement to that effect. In sum, therefore, although arbitration may be enjoined "insofar as" the particular contractual provisions require conduct within the contemplation of Section 8(e), it should not be enjoined if there is no such object or effect. Any injunction against arbitration should delineate the unlawful conduct enjoined and should not be so broad as to include a proscription against possible lawful conduct.

Here, the original injunction, in section (a) thereof, enjoining arbitration, specifically limited the injunction in this respect by making it applicable only "insofar as Article I" required conduct unlawful under Section 8(e). Then, however, at the request of the charging parties and over the Board's objection, the court amended the order nunc pro tunc to add paragraph (c)

thereof which was not so limited and which bans arbitration of "any issue or dispute arising out of the provisions of Article I" relating to work performed by employees of certain employers. We respectfully submit that as amended the injunction is too broad in scope and may improperly enjoin lawful conduct.

Moreover, here, too, the court erred in granting injunctive relief at the request of the charging parties, over the Board's objection. As we have demonstrated above, the Act and the Norris-LaGuardia Act preclude the grant of injunctive relief at the request of a charging party when the Board does not seek such relief. Obviously, this applies to broadening an injunction beyond one sought by the Board as well as to the grant of an injunction in the first instance. The observations of the Court of Appeals for the Second Circuit in McLeod v. Mechanics Conference Board, 300 F. 2d 237, 242-243, are pertinent:

> The charging party, Rand, contends the handbills distributed are untruthful and, therefore, not protected by the publicity proviso." Because the Regional Director has not relied upon this in his petition or argument, we believe the question governed not by section 10(1), but by the Norris-LaGuardia Act. We lack jurisdiction, therefore, to grant relief. Section 10(1) is operative only upon the filing of a petition by a Regional Director of the Board. This limitation was imposed in order to restrict the potential involvement of federal courts in labor disputes. For that reason, we do not read it to allow consideration of issues not raised by the Regional Director. To do otherwise would not only increase the danger of over-involvement on the part of the federal courts but would also ignore the expertise which section 10(1) commands us to attribute to the Regional Director. It is his view of the facts and law the district judge is to evaluate in a section 10(1) proceeding. The courts are not free to roam at will over every aspect of a labor dispute upon the request of the charging party. We are mindful of the fact the statute allows the charging party to appear by counsel and present relevant testimony. We believe, however, the principal role in these proceedings is to be played by the Regional Director acting in the public interest, and while the charging party is free to aid him in the course of the litigation, the charging party may not substitute itself as the principal complainant.

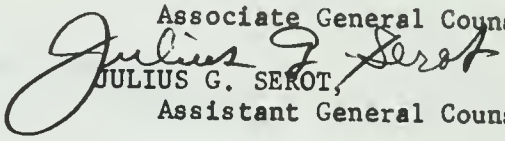
CONCLUSION

Although, we submit, under the Act it is the exclusive right of the Board to determine the relief to be sought, it might be noted in concluding that the stipulation tendered by the Board, as the Board demonstrated to the court below, fully and adequately protected the policies of the Act and, indeed, the interests of all concerned and was eminently appropriate in the circumstances. Thus, the Unions and Employers undertook flatly not to engage in conduct violative of Section 8(e); specifically agreed not to apply the alleged illegal contract provisions pending their arbitration; specifically agreed, further, that regardless of the arbitrator's determinations, they would not give effect to the provisions, even as interpreted, if the appropriate Board representative was of the opinion that the provisions, as interpreted, continued to violate Section 8(e); and agreed that in the event the Unions or Employers engaged in any conduct which in the opinion of the Board's representative was violative of the stipulation, an injunction could be entered without further hearing. The gravamen of Section 8(e) and of the petition herein was that the Unions and Employers had made and were maintaining and giving effect to a contract which would result in a cessation of business between the Employers and other employers. But by the stipulation they undertook not to cease doing business pursuant to the contract pending litigation of the issues. There was, thus, in reality nothing to enjoin at this time - and there was the added safeguard that if it ever appeared that the unlawful conduct had been resumed, an injunction which of course would then be warranted, could be entered without further hearing.

We respectfully submit that for the reasons set forth above the court below committed reversible error and the judgment of the court below should be reversed and the case remanded for the entry of an order approving stipulation.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,



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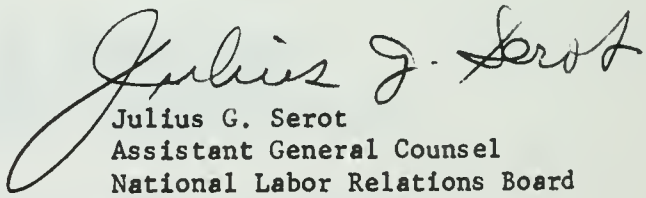
Attorneys.

National Labor Relations Board

July 1965.

C E R T I F I C A T E

THE UNDERSIGNED CERTIFIES THAT HE HAS EXAMINED THE PROVISIONS OF RULES 18 AND 19 OF THIS COURT AND IN HIS OPINION THE TENDERED BRIEF CONFORMS TO ALL REQUIREMENTS.



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